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SUPREME COURT, U.S.

NO. 79-2034

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

ORIGINAL COPY

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA McCULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

deceased

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Respondent.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Respondents Ella McCullough, Janet Richmond, Agnes Grant, Belle Barnett, James Perito, Jennie Landers, and Josephine Maniccia ask leave to file the attached Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit and to proceed in forma pauperis pursuant to Rule 46. Leave to proceed in forma pauperis was not sought in the courts below except as to respondents James Perito and Jennie Landers, as to whom leave was granted by the district courts.

The affidavits of John McCullough, Janet Richmond, Agnes Grant, Muriel Rothstein, Amelia Schenk, Jenny Landers, and Josephine Maniccia in support of this motion are attached hereto.

RENE H. REIXACH, JR., ESQ.
Counsel of Record for Respondents
Ella McCullough, Janet Richmond,
Agnes Grant, Belle Barnett,
James Perito, Jennie Landers
and Josephine Maniccia
Greater Upstate Law Project
80 West Main Street
Rochester, New York 14614
Tel: 716-454-6500

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendant.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

AFFIDAVIT OF RESPONDENT
JOHN McCULLOUGH IN SUPPORT
OF MOTION TO PROCEED
IN FORMA PAUPERIS

CITY OF SYRACUSE)
COUNTY OF ONONDAGA)ss:
STATE OF NEW YORK)

JOHN McCULLOUGH, being duly sworn, deposes and says:

1. That I am the son of respondent, Ella McCullough, in the above entitled case. I make this affidavit in support of motion to proceed in forma pauperis for my mother as she is not above to comprehend these proceedings or this motion.

2. My mother has been a patient at the VanDuyn Home and Hospital in Syracuse, New York, since September 18, 1978. She is senile and unable to care for herself.

3. The current cost of her care at the Van Duyn Home and Hospital is in excess of $960.00 per month.

4. My mother has no income aside from the $250.10 in Social Security benefits she received each month. She must apply

all of this income except for $44.10 per month to pay for the cost of her care at VanDuyn Home and Hospital. The remaining cost of her care is provided by Medicaid. She must use the $44.10 to meet her personal needs, including clothing, toiletries, and other personal needs and for Blue Cross-Blue Shield monthly payments.

5. She has no assets other than her regular Social Security checks.

6. Because of her limited income and resources, she is unable to pay the costs of this case, or give security therefor.

7. I believe my mother is entitled to redress in this action.

8. The nature of this case is briefly stated as follows:

On April 16, 1980, the United States Court of Appeals for the Second Circuit unanimously affirmed the decision and order of the United States District Court for the Northern District of New York dated November 29, 1979. The district court order granted a preliminary injunction, enjoining New York State Social Services officials from denying Medicaid to aged, blind and disabled individuals, based upon their prior transfer of assets. The order also denied Petitioner Blum's motion for summary judgment. Petitioner Blum is seeking a writ of certiorari in this court to review the determinations to grant the preliminary injunctions.

WHEREFORE, I respectfully request that an Order of this Court issue, granting respondents herein leave to proceed in this Court in forma pauperis, and for such other and further relief as this Court may deem just, equitable and proper.

John McCullough

Sworn to before me this
18th day of August 1980

MaryAnne Hanford
Commissioner of Deeds
Commission expires 12/31/80
Syracuse, New York,

MARY ANNE HANFORD
Commissioner of Deeds
City of Syracuse
Syracuse, New York
Commission Expires Dec. 31, 1980

MAY 13 1980

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979
No. 79-

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA McCULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendant.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

AFFIDAVIT OF RESPONDENT
JANET RICHMOND IN SUPPORT
OF MOTION TO PROCEED
IN FORMA PAUPERIS

Janet Richmond being duly sworn deposes and says:

1. I am one of the named respondents in the above-entitled case. I am presently residing in the Tri-County Nursing Home, in North Creek, Warren County, New York, since I am unable to walk and require assistance with all bodily functions.

2. Because of my poverty I am unable to pay costs of said case or give security therefor. My only income is my social security check, which is paid directly to the Nursing Home, and a small distribution from a trust which over the past few years has been under thirty dollars ($30.00) per year. I do not own any property other than my personal clothing and effects and would not be able to remain in the nursing home were it not for the medical assistance I am presently receiving from the State.

3. I believe I am entitled to redress in said case.

4. The nature of said case is briefly stated as follows:

On April 16, 1980, the United States Court of Appeals for the Second Circuit unanimously affirmed the judgment of the United States District Court for the Northern District of New York dated November 29, 1979. The district court judgment granted preliminary injunctive relief enjoining New York Social Services officials administering New York's medical assistance (Medicaid) program from enforcing Social Services Law § 366.1(e), 18 N.Y.C.R.R. 360.8 and New York State Department of Social Services Administrative Directives 77 ADM-73 and 78 ADM-89 which law and directives would, if enforced, deny medical assistance benefits to those persons who have made voluntary transfers of property either prior to application or while receiving medical assistance.

Both courts held also that the respondents are likely to prevail on the merits in an action challenging New York's imposition of more restrictive medicaid eligibility conditions on medically needy persons than on categorically needy SSI recipients where the Social Security Act by its terms and as consistently interpreted by the courts of appeal, the Congress and the Department of Health, Education and Welfare, does not permit a state to impose more restrictive medicaid eligibility conditions on medically needy persons than on categorically needy SSI recipients.

Further, both courts held that respondents and the class of aged, blind or disabled persons would be irreparably injured by being completely disqualified for medicaid benefits

necessary to insure the provision of health care including hospital and skilled nursing facility care. The petitioner, Barbara B. Blum, Commissioner of the New York State Department of Social Services, is seeking a writ of certiorari in this court to review those determinations.

WHEREFORE, your deponent respectfully prays for an Order of this Court granting respondent herein leave to proceed in this Court informa pauperis, and for such other and further relief this Court may deem just, equitable and proper.

JANE GOODSPEED
Notary Public in the State of New York
appointed for Warren County
My Commission Expires Mar. 30, 19[illegible]

JANET RICHMOND

Sworn to before me this
12th day of May, 1980.

Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-2034

BARBARA BLUM, as Commissioner of the New York State Deparment of Social Services,

Petitioner,

v.

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, and next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendant.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

AFFIDAVIT OF RESPONDENT
AGNES GRANT IN SUPPORT
OF MOTION TO PROCEED
IN FORMA PAUPERIS

AGNES GRANT, being duly sworn, deposes and says:

1. I am one of the named respondents in the above-entitled case.

2. I have no income except the $344.00 a month I receive from Social Security. Out of that I pay all my necessary expenses, including payments for Blue Cross and Blue Shield Insurance and Medicare. I also receive Medicaid, which is very important to me since I have very high bills every month for my medicine and drugs. I am 75 years old, and have difficulty walking as I suffer from arthritis and fluid retention.

3. I have been able to stay in my own home only because my relatives and friends come over regularly to help me and to take care of my needs.

My basic monthly expenses come to $315.50, without taking into consideration clothing, gifts or extras.

4. I have no assets other than my regular Social Security checks.

5. Because of my limited income and resources, I am unable to pay the costs of this case; or give security therefore.

6. I beleive I am entitled to redress in this action.

7. The nature of this case is briefly stated as follows:

On April 16, 1980, the United States Court of Appeals for the Second Circuit unanimously affirmed the decision and order of the United States District Court for the Northern District of New York dated November 29, 1979. The district court order granted a preliminary injunction, enjoining New York State Social Services officials from denying Medicaid to aged, blind, and disabled individuals, based upon their prior transfer of assets. The order also denied Petitioner Blum's motion for summary judgment. Petitioner Blum is seeking a writ of certiorari in this court to review the determinations to grant the preliminary injunction.

WHEREFORE, I respectfully request that an Order of this Court issue, granting Respondents herein leave to proceed in this Court in forma pauperis, and for such other and further relief as this Court may deem just, equitable, and proper.

Agnes Grant

Agnes Grant

Sworn to before me this
17th day of [illegible], 1980.

Notary Public

SUZANNE BAKER
Notary Public, State of New York
NO. 4928326
Qualified in Nassau County
Commission Expires March 30, 1982

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-2034

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA McCULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendant.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

AFFIDAVIT OF MURIEL ROTHSTEIN, NEXT FRIEND OF RESPONDENT BELLE BARNETT, IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

MURIEL ROTHSTEIN, being duly sworn, deposes and says:

1. I have acted as next friend of Belle Barnett, one of the named respondents in this action, throughout the proceedings below. Belle Barnett has resided in a nursing home for several years and suffers from, among other things, senility.

2. The only income Belle Barnett has is her one-third share of a monthly social security check for her and her husband of $569.90, or $189.97. Under the medicaid program she is allowed to retain only $28.50 per month for all her non-medical needs (including legal expenses); the balance must be turned over to the nursing home to help pay for her care.

3. To my knowledge Belle Barnett has no assets whatsoever. A joint savings account which she had with her husband

was transferred by him into his own name; it was that transfer of property that led to her being initially denied medicaid and intervening in this action to obtain medicaid coverage. Her husband has recently suffered a stroke and is also currently a nursing home resident. Throughout this case he retained what savings he had to meet his own needs, and those savings will now be required for his care.

4. Because of the limited income and resources of Belle Barnett she is unable to pay the costs of this action or give security therefor.

5. I believe Belle Barnett is entitled to redress in this action.

6. The nature of this case is briefly stated as follows:

On April 16, 1980, the United States Court of Appeals for the Second Circuit unanimously affirmed the decision and order of the United States District Court for the Northern District of New York dated November 29, 1979. The district court order granted a preliminary injunction, enjoining New York State Social Services officials from denying Medicaid to aged, blind, and disabled individuals, based upon their prior transfer of assets. The order also denied Petitioner Blum's motion for summary judgment. Petitioner Blum is seeking a writ of certiorari in this court to review the determinations to grant the preliminary injunction.

WHEREFORE, I respectfully request that an Order of this Court issue, granting Respondents herein leave to proceed in this Court in forma pauperis, and for such other and further relief as this Court may deem just, equitable and proper.

Muriel E Rothstein
MURIEL ROTHSTEIN

Sworn to before me this
5th day of August, 1980

R H Reixach Jr

RENE H. REIXACH, JR.
NOTARY PUBLIC, State of New York
No. 8542715
Qualified in Monroe County
Commission Expires March 30, 1982

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
NO.

----------X

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT, and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L.LASCARIS, as Commissioner of Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

----------X

BARBARA BLUM,individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

AFFIDAVIT OF AMELIA SCHENK IN SUPPORT OF RESPONDENT JAMES PERITO'S MOTION TO PROCEED IN FORMA PAUPERIS

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Respondent.

----------X

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

----------X

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

----------X

AMELIA SCHENK, being duly sworn, deposes and says:

1. I am a daughter of JAMES PERITO and the late ANITA PERITO, respondents in the above-captioned proceeding.

2. JAMES PERITO is bed-ridden and cannot attend to his own basic needs. He requires the services of a home attendant twenty four hours per day, seven days per week.

3. Because my father is physically incapacitated, he is unable to sign an affidavit in support of his motion to proceed in forma pauperis. I take care of his financial affairs which includes paying his bills and seeing that his needs are met. I am fully familiar with the facts stated herein.

4. Because of his poverty, my father is not able to pay costs of the above titled case or to give security therefor. After paying about $280.00 per month to the home attendant (the balance of the home attendant's salary is being paid by Medicaid), my father has only about $291.00 left from his Social Security benefit ($391.60) and his pension ($180.60) to meet his basic needs for food and other essentials. My father's attorney has informed me that an individual living alone in New York State who receives Supplemental Security Income (SSI) to supplement his other "unearned income" like Social Security and pensions has a total monthly income of $291.40.

5. I believe that my father ie entitled to redress in this case.

6. The nature of this case is briefly stated as follows:

On April 16, 1980, the United Stated Court of Appeals for the Second Circuit unanimously affirmed the order of the United States District Court for the Northern District of New York dated November 29, 1979, which granted a preliminary injunction restraining enforcement of New York Social Services Law §366(1)(e). Injunctive relief was granted on the ground that Social Services Law §366(1)(e), the "transfer of assets" restriction, violates the Social Security Act, 42 U.S.C. §1396a (a)(10)(C)(i). The preliminary injunction means that New York

Social Services officials who administer New York's federally financed medical assistance ("Medicaid") program cannot deny Medicaid to medically needy persons, like my father, who transferred property prior to applying for Medicaid. By denying Medicaid to people like my father, the Social Services officials had not applied eligibility standards to the medically needy aged, blind, and disabled people that were comparable to the standards applied to the categorically needy. Thus, the Social Services officials imposed more restrictive eligibility requirements upon the medically needy than upon the categorically needy in violation of 42 U.S.C. §1396a(a)(10)(C)(i). The petitioner, Barbara Blum, Commissioner of the New York State Department of Social Services, is seeking a writ of certiorari in this court to review those determinations.

WHEREFORE, your deponent respectfully prays for an Order of this Court granting respondent herein leave to proceed in this Court in forma pauperis, and for such other and further relief this Court may deem just, equitable and proper.

Amelia Schenk
AMELIA SCHENK

Sworn to before me this
29th day of May, 1980

CECIL H. STRAKER
Notary Public, State of New York
No. 24-4658145
Qualified in Kings County
Commission Expires March 30, 19 81

Cecil H. Straker
NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendant.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

AFFIDAVIT OF RESPONDENT
JENNY LANDERS IN SUPPORT
OF MOTION TO PROCEED
IN FORMA PAUPERIS

JENNY LANDERS, being duly sworn, deposes and says:

1. I am one of the named respondents in the above-entitled case. I currently reside in Highgate Manor Nursing Home, 28 Kellogg Road, Cortland, New York in that facility's skilled nursing unit.

2. I have been in this facility since December 31, 1979, when I was transferred here from Wilson Memorial Hospital's extended care facility in Johnson City, New York. I am bedridden and unable to care for myself.

3. The current cost of my care at Highgate Manor Nursing Home is in excess of $1,400.00 per month.

4. I have no income aside from the $340.10 in Social Security benefits I receive each month. I must apply all of this income except for $29.10 per month to pay for the cost of my care

in this nursing home. The remaining cost of my care is provided for by Medicaid. I must use the $29.10 per month to meet my personal needs, including clothing, toiletries, and other personal needs.

5. I have no assets other than my regular Social Security checks.

6. Because of my limited income and resources, I am unable to pay the costs of this case, or give security therefor.

7. I believe I am entitled to redress in this action.

8. The nature of this case is briefly stated as follows:

On April 16, 1980, the United States Court of Appeals for the Second Circuit unanimously affirmed the decision and order of the United States District Court for the Northern District of New York dated November 29, 1979. The district court order granted a preliminary injunction, enjoining New York State Social Services officials from denying Medicaid to aged, blind, and disabled individuals, based upon their prior transfer of assets. The order also denied Petitioner Blum's motion for summary judgment. Petitioner Blum is seeking a writ of certiorari in this court to review the determinations to grant the preliminary injunction.

WHEREFORE, I respectfully request that an Order of this Court issue, granting Respondents herein leave to proceed in this Court in forma pauperis, and for such other and further relief as this Court may deem just, equitable, and proper.

J Landers

Jennie Landers

Sworn to before me this
29 day of May, 1980.

Carol C Morgan

Notary Public

CAROL C. MORGAN
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN CORTLAND CO. #4693335
MY COMMISSION EXPIRES MARCH 30, 19 81

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
NO. 79-

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondent,

and

JAMES L. CONERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

LESLIE H. COHEN
ATTORNEY AT LAW
301 CORTLAND
SAVINGS BANK BLDG.
CORTLAND, N.Y. 13045

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendant.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

JOSEPHINE MANICCIA being duly sworn deposes and says:

1). I am one of the Respondents in the above entitled case and make this affidavit in my own behalf. I presently reside in the Highgate Nursing Home in the City of Cortland, County of Cortland and State of New York.

LESLIE H. COHEN
ATTORNEY AT LAW
100 CORTLAND
SAVINGS BANK BLDG.
CORTLAND, N.Y. 13045

2). I am financially unable to pay the cost of this case or give any security therefore. I receive $209.70 per month from Social Security. I pay $200.00 a month as a chronic payment to the Highgate Nursing Home for my maintance at that facility. My husband, Augusto Maniccia, receives $314.20 a month from Social Security but he is required to expend all of that money for his own living expenses in our family home where he resides currently. Monthly payments for utilities, phone, food, City taxes, Schoold taxes and fire insurance far exceed the Social Security income of my husband on a monthly basis.

3). I believe we are entitled to redress in this case.

4). The nature of the case is briefly as follows. New York law requires that an applicant for medical assistance not voluntarily transfer an asset for the purpose of qualifying for eligibility to receive such assistance. Any transfer made within 18 months of application is presumed to have been made for the purpose of qualifying only. In this action, I seek to have such statute be declared unconstitutional and seek to enjoin the State of New York from enforcing this statute against me. I believe that the cause of action is both meritorious and legally sound and I ask that this court grant my request.

WHEREFORE, your deposent respectfully prays for an order of this court granting Respondent leave to proceed in this court in-forma pauperis, and for such other and further relief as may be just.

Josephine Maniccia
JOSEPHINE MANICCIA

Sworn to before me this 23rd day of May, 1980.

Notary Public

LESLIE H. COHEN
ATTORNEY AT LAW
100 COURTLAND
SAVINGS BANK BLDG.
CORTLAND, N.Y. 13045

NO. 79-2034

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA McCULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Respondent.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

BRIEF FOR RESPONDENTS ELLA McCULLOUGH, JANET RICHMOND, AGNES GRANT, BELLE BARNETT, JAMES PERITO, JENNIE LANDERS, AND JOSEPHINE MANICCIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF AUTHORITIES

CASES

Aitchison v. Berger, 404 F.Supp. 1137 (S.D.N.Y. 1975), aff'd 538 F.2d 307 (2d Cir. 1976), cert. denied 429 U.S. 890 (1976) 4

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Morabito v. Blum, 80 Civ. 4584RJW (S.D.N.Y.) 3

Philbrook v. Glodgett, 421 U.S. 707, 719 (1975) 5

Robinson v. Pratt, Civil no. 79-1278-S (D. Mass. June 24, 1980) 4

Scarpuzza v. Blum, 73 A.D. 2d 237, 426 N.Y.S. 2d 505 (2d Dept. 1980), motion for leave to appeal granted ____ N.Y.2d ____ (July 3, 1980) 3

REGULATIONS

42 C.F.R. §435.401 4

OTHER AUTHORITIES

119 Cong. Rec. H11957 (Dec. 21, 1973) 5

38 Fed. Reg. 3246 (Nov. 21, 1973) 5

House Rep. No. 96-589, Part 2, 96th Cong., 2d Sess., April 23, 1980 to accompany H.R. 4000, the Medicare and Medicaid Amendments of 1980. 4

H.R. 7765 5

S.2885 5

STATEMENT OF THE CASE

Respondents* will not restate the facts or proceedings below, with but one exception. Petitioner's history of the proceedings below omits two significant rulings in this Court in this case: the opinion of Mr. Justice Marshall as Circuit Justice on May 6, 1980 denying a stay, and the subsequent denial by the full Court by order dated June 2, 1980, of Petitioner's renewed application for a stay. Docket no. A-946. Significantly, the renewed application was premised on the decision in Dawson v. Myers, No. 79-3246 (9th Cir. May 14, 1980), rehearing denied July 30, 1980, which conflicted with the decisions below. This conflict is also the principal reason Petitioner now urges for review of this case.

SUMMARY OF ARGUMENT

The order sought to be reviewed is not a final judgment but merely a preliminary injunction. In addition, the actions of Petitioner and of the Congress may cause the order below to abate before review could be completed by this court. The rulings below are in accord with the consistent positions of the Department of Health and Human Services (formerly the Department of Health, Education and Welfare) and with the legislative intent of the Social Security Act.

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* As set forth in the Petition (p.5 fn.), several respondents, plaintiffs or plaintiffs-intervenors below have died. In addition to those listed in the Petition, respondent Louis Friedman has also died.

REASONS FOR DENYING THE WRIT

I.

THE PRELIMINARY INJUNCTION SOUGHT TO BE REVIEWED IS OF UNCERTAIN DURATION AND NOT SUFFICIENTLY FINAL

The status of the preliminary injunction which Petitioner seeks to have reviewed is in a state of flux and should not be reviewed by this Court. Petitioner has notified the Department of Health and Human Services [HHS] (formerly Health, Education and Welfare) that New York is cancelling the contract whereby HHS determines medicaid eligibility for SSI recipients. This cancellation is scheduled to take effect August 29, 1980, more than a month before the Petition could even be acted upon and close to a year before the case would be likely to be determined on the merits (Petition, pp. A-56 to A-58).

If the cancellation of that contract goes into effect the nexus between the eligibility criteria for the Supplemental Security Income (SSI) program and the medically needy program which was the underpinning of the decisions below (See Petition, pp. 5, 7) will have abated before the case can be heard. As the letter of cancellation makes clear, the purpose of cancellation is so that New York could reinstate its transfer of assets rule (Petition, p. A-57). Petitioner has made a motion in the district court to modify the injunction herein to allow reinstatement of that rule once the contract cancellation takes effect. Petitioner's right to reinstate her transfer of assets rule is being contested in the district court.* How, or when, that court will rule, or how (or when) any appeals from that ruling might be

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* Respondents note, however, that the legality of any such reinstated rule would be determined, in part, by the same sort of "comparability" analysis pursued by the courts below.

determined remains to be seen. Presumably, if the district court does not grant Petitioner's motion to modify the injunction to permit reinstatement of the transfer of assets rule, the cancellation of the contract might be revoked since its stated purpose would have been thwarted. All that can be said with assurance is that the status of the injunction below is, and will be for some time, uncertain.*

Petitioner will not be deprived of her chance for ultimate review of the issues determined below if the Petition is denied. She will have a second chance after final judgment is entered and the self-inflicted uncertainty caused by her attempts to change the status of New York's medicaid program has been resolved. She will also have the opportunity to seek review from any final adverse rulings in various proceedings in the state courts which reached a result identical to that of the courts below, e.g. Scarpuzza v. Blum, 73 A.D.2d 237, 426 N.Y.S.2d 505 (2d Dept. 1980), motion for leave to appeal granted ____ N.Y.2d ____ (July 3, 1980).

The Petition should be denied because of the uncertainty which Petitioner's own maneuverings have created about whether there will be anything left to review.

II.

THE ORDER BELOW IS IN ACCORD WITH SETTLED LAW

Petitioner seeks to justify review of the order below by

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* Additionally an action has just been filed seeking to preliminarily and permanently enjoin the entire proposed conversion of New York's medicaid program. Morabito v. Blum, No. 80 Civ. 4584 RJW (S.D.N.Y.).

pointing out that it conflicts with the decision in Dawson v. Myers, No. 79-3246 (9th Cir. May 14, 1980), rehearing denied July 30, 1980 [Petition, A-9 & A-10]. The simple fact is that such conflict as exists is between the decision in Dawson and every other federal court* which has considered the matter, as well as between Dawson and the regulations and policies of the Department of Health and Human Services; if any review is required it is not review of this case.

The concept of "comparability" accepted by the courts below as the basis for their rulings has been followed by every court to address the question prior to Dawson, including two prior cases against Petitioner's predecessors in office. Greklek v. Toia, 565 F.2d 1259 (2d Cir. 1977), cert. denied sub nom. Blum v. Toomey, 436 U.S. 962 (1978); Aitchison v. Berger, 404 F.Supp. 1137 (S.D.N.Y. 1975), aff'd 538 F.2d 307 (2d Cir. 1976), cert. denied 429 U.S. 890 (1976).

The decision below is also in accord with the position of the Department of Health and Human Services both in its formal regulation, 42 C.F.R. §435.401, and its advice to the several states referred to in the decision below (Petition, A-20, A-69).

The court of appeals below likewise recognized (Petition A-38), as did the Dawson court (Petition, p. A-70), that Congress has repeatedly stated that under current law transfer of assets rules in states like New York are illegal.** The legislative history of the 1973 Social Security Act Amendments is also in

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* Since the Petition was filed the district court in Massachusetts has agreed with the courts below that a transfer of assets rule in a state with an agreement for the Social Security Administration to determine medicaid eligibility for SSI recipients is illegal. Robinson v. Pratt, Civil no. 79-1278-S (D. Mass. June 24, 1980) [copy annexed].

** Most recently the House has joined the Senate in taking that view. House Rep. No. 96-589, Part 2, 96th Cong. 2d Sess., April 23, 1980, to accompany H.R. 4000, the Medicare and Medicaid Amendments of 1980, p.76.

accord with the decision below. At HEW's suggestion [38 Fed. Reg. 32216 (Nov. 21, 1973)] the Act was amended to "coordinate the medicaid program with the SSI program." 119 Cong. Rec. H11957 (Dec. 21, 1973). Petitioner's request for relief should be addressed to Congress, not to the Court. Cf. Philbrook v. Glodgett, 421 U.S. 707, 719 (1975).*

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Dated: August 19, 1980

RESPECTFULLY SUBMITTED,

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---

* Provisions permitting states to impose transfer of assets rules under certain conditions are incorporated in both the Senate and House versions of the "reconciliation" bill required to be enacted this fall as part of the budgetary process. S.2885, §511; H.R. 7765, §333.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SADIE ROBINSON, Plaintiff, v. JOHN PRATT, ET AL., Defendants.	*	CIVIL ACTION NO. 79-1278-S

MEMORANDUM AND ORDER

June 24, 1980

SKINNER, D.J.

The original plaintiff, an eighty-three year old woman, sought to enjoin the application of the Massachusetts medical assistance program's "transfer of assets" provision, M.G.L.A. c.118E §13, 106 C.M.R. 325.060(C)(1979),[1] to her and other persons similarly situated, alleging that to the extent that it operates to deny her medical assistance benefits (Medicaid) it violates the Equal Protection Clause of the Fourteenth Amendment and is in conflict with Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq. On July 10, 1979, I issued a temporary restraining order which prevented defendant Pratt from denying Medicaid benefits to the plaintiff on the basis of this provision. Plaintiff amended her complaint to add the Secretary of Health and Human Services and seeks to compel her to enforce her Department's regulations with respect to the Massachusetts

---

[1] The regulation provides:

> Transfer of Real or Personal Property
>
> MA (Medical Assistance) shall not be granted to an applicant who, at any time within one year immediately prior to the filing of an application for MA, has made an assignment or transfer of real or personal property so as to render himself eligible for such assistance.

Plaintiff's challenge applies both to the regulation and its statutory counterpart.

provision. 42 U.S.C. §§1396a(b), 1396a(c)(1976). Jurisdiction is predicated on 28 U.S. §§1331, 2201-2202 (1976), and the case is currently before me on plaintiff's motions for summary judgment, Fed.R.Civ.P. 56, and class certification, Fed.R.Civ.P. 23(b)(2). The Secretary has moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6).

The case of the original plaintiff is now moot. The transfer of assets which disqualified her under the Massachusetts rule occurred on April 20, 1979. The disqualification expired on April 20, 1980. Accordingly, the case as to Sadie Robinson is DISMISSED as moot. Similarly, the intervenors John N. Brown and Jane Brown were denied eligibility because of a purchase of an automobile (an exempt item) on May 22, 1979. Their claim must also be DISMISSED as moot. 106 C.M.R. 325.060(C)(1979).

The transfer said to disqualify the intervenor George Sweeney, however, occurred on December 3, 1979, and he is still disqualified from receiving Medicaid. Mr. Sweeney's case not only represents a harsh application of the rule, but also dramatically demonstrates the unequal treatment of which the plaintiff complains. The disqualifying payment was made from their joint account by plaintiff's wife, without the knowledge of the plaintiff, who is suffering from senile dementia. It disqualifies the plaintiff from receiving Medicaid but does not disqualify Mrs. Sweeney from receiving Supplementary Security Income (SSI). He seeks a temporary restraining order preventing the defendant from withholding Medicaid because of his alleged "transfer of assets".

Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq. (1976), provides the framework for a comprehensive cooperative federal-state medical assistance program. A state intially becomes eligible for federal funds upon submission of a medical assistance benefits plan which fulfills the requirements of the statute, 42 U.S.C. §1396a(a)(1976), and receives the approval of the Secretary. 42 U.S.C. §1396a(b)(1976).

Once a state decides to participate in the Medicaid program it may tailor its particular plan to its own resources and needs within federally defined limits. For example, the Title XIX state plan must make Medicaid benefits available to all individuals who are aged, blind, or disabled, the so-called "categorically needy", 42 U.S.C. §1396a(a)(10)(A)(1976); 42 C.F.R. §435.4 (1979). The state may, however, define the categorically needy to include all persons who receive SSI, 42 U.S.C. §1396a(a)(10)(A)(1976), or it may use more restrictive eligibility conditions. 42 C.F.R. §435.121 (1979). If the state elects this latter option, its requirements may be no more restrictive than those in effect under the state's Medicaid plan on January 1, 1972 and, in determining an individual's financial eligibility, the state must deduct any SSI payments received by that individual. 42 C.F.R. §435.121(b)(1)(2)(1979).

In addition to the mandatory coverage of the categorically needy individuals, states may extend Medicaid to other groups of individuals who would otherwise be eligible for Medicaid benefits but whose income and resources are above the limits for the

categorically needy; within the context of this case, these individuals comprise the "medically needy" group. 42 U.S.C. §1396a(a)(10)(C)(1976); 42 C.F.R. §435.4 (1979). If the state desires to extend benefits to "medically needy" individuals its administering agency "must not use requirements for determining [medically needy] groups that are . . . for the aged, blind, and disabled individuals, more restrictive than those used under SSI, except for individuals receiving an optional state supplement . . . or individuals [subject to the more restrictive requirements] as allowed by 42 C.F.R. §435.121."[2]

Massachusetts has elected to participate in the Medicaid program and to extend coverage to the medically needy as well as categorically needy groups. M.G.L.A. c.118E §1 (1979). In providing Medicaid coverage for the aged, blind, and disabled, Massachusetts has chosen to make all SSI recipients automatically eligible for benefits (the "categorically needy"), and to extend benefits to others who would otherwise be eligible for benefits "but for income and resources, provided they meet the requirements of financial eligibility . . ." as set forth in the statute. One such requirement is the "transfer of assets" provision. M.G.L.A. c.118E §13 (1973); 106 C.M.R. 325.060(C)(1979).

Plaintiff contends, inter alia, that the Massachusetts transfer of assets rule is in conflict with Title XIX and the applicable HHS regulations in that it creates

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[2] Because of the manner in which Massachusetts has chosen to determine eligibility and administer its optional state supplement plan, these latter two exceptions do not apply to the Massachusetts plan.

additional eligibility requirements not authorized by the Medicaid statutory scheme. The Act requires states, which have chosen to include groups other than categorically needy groups, to make benefits available to individuals who would, except for their income and resources, be eligible for SSI benefits and who have insufficient income and resources for covered medical care. Insufficiency of income must be determined in accordance with standards which are "comparable" to the standards used in determining eligibility for SSI. 42 U.S.C. §1396a(a)(10)(C)(i)(1976).

Plaintiff argues that a transfer of assets would not preclude him from SSI benefits, Social Security Administration's Claims Manual §12507(a), and that Massachusetts' use of it to render him ineligible for Medicaid is in violation of the statute. Defendant argues that the transfer of assets provision serves the justifiable state purpose of preventing individuals from fraudulently obtaining Medicaid benefits and guarding the scarce welfare resources of the Commonwealth. Alternately, defendant argues that the provision be treated as a collateral restriction designed to police fraud.

I may not consider plaintiff's claim under the statute and regulations in the absence of a non-frivolous constitutional claim under the Equal Protection Clause of the Fourteenth Amendment. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979). While I am not now as sanguine as I was on July 10, 1979 about the plaintiff's likelihood of success on the merits, I conclude that

his constitutional claim is genuine, colorable, and not frivolous. I must proceed to consideration of the statutory claims before reaching the constitutional one. Rosado v. Wyman, 397 U.S. 397 (1970).

The Courts of Appeal of the Second and Fourth Circuits have held that disqualification from Medicaid by reason of a prior transfer of assets is in conflict with the federal statutes and regulations referred to above. Caldwell v. Blum, ___ F.2d ___, (2d Cir., No. 79-7864, April 16, 1980); Fabula v. Buck, 598 F.2d 869 (4th Cir. 1979). Accord, Buckner v. Maher, 424 F.Supp. 366 (D. Conn. 1976), aff'd 434 U.S. 898 (1977).

The Court of Appeals for the Ninth Circuit has taken a contrary view, holding that imposing the transfer of assets disqualification on Medicaid applicants does not violate the statutes, because the mandate to employ "comparable" standards of income does not mean "the same" standards. Dawson v. Myers, ___ F.2d ___ (9th Cir., No. 79-3246, May 14, 1980).[3]

---

[3] In the District Court, Judge Lucas held that the no-transfer rule was not a standard of eligibility, but a collateral restriction designed to police fraud. The Court of Appeals rejected this view. If the transfer of assets was clearly keyed to a fraudulent intent by the terms of the regulation, I have no doubt that it could be sustained as a collateral restriction, but the Massachusetts' regulation is not so restricted. D.C. Central Dist. Cal., No. 78-2350, sub nom. Dawson v. Beach.

I adopt the reasoning of Judge Mansfield in Caldwell v. Blum, supra, and hold that the disqualification from Medicaid by reason of a prior transfer of assets violates the comparability provision of 42 U.S.C. §1396a(a)(10)(C)(1976) and the attendant regulation, 42 C.F.R. §435.401(c)(1979).

The next question concerns the function of the courts in administering and enforcing these provisions, a problem not addressed by any of the courts cited above. 42 U.S.C. §1396c grants enforcement powers to the Secretary of HHS:

> §1396c. Operation of State plans
>
> If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds -
>
> (1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or
>
> (2) that in the administration of the plan there is a failure to comply substantially with any such provision;
>
> the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure). [Emphasis supplied].

It appears from the opinion in Dawson v. Myers, supra, that several regional administrators of HHS have expressed disapproval of no-transfer rules in letters to state welfare departments. In her brief in this case, the Secretary informs me that she has

informed the Massachusetts Department of Welfare that it is not in compliance with federal law because of the no-transfer rule. She says, however, that imposition of sanctions under §1396(c) is discretionary so that there is no basis for the issuance of a writ of mandamus against her. The emphasized language in parentheses in the quoted provision bears out this contention. I agree that a writ of mandamus against the Secretary should not be issued.

The Secretary goes farther, however, and suggests that the court has some power to grant more effective relief and to save her from the pain of decisionmaking. In her brief she asserts the following:

> The drastic sanction of withholding Federal payments under 42 U.S.C. 1396c also is an indirect sanction. The Secretary withholds further payments "until the Secretary is satisfied that there will no longer be any such failure to comply". The Secretary cannot compel compliance. If this Court is so inclined, it can give plaintiff the relief she seeks by issuing an order directly against the State defendant; and this would be a far more appropriate means of removing the challenged transfer-of-property restriction from the Massachusetts Medicaid program.
>
> * * * *
>
> Plaintiff has no standing to invoke this Federal provision before this Court, and the relief requested with respect to the Secretary would not achieve the desired change in State policy. (Such a change could be obtained far more easily by an order of this Court directly against State officials.) [Emphasis supplied].

Memorandum of Defendant Harris in Support of Motion to Dismiss at 10.

I am at a loss to discover what remedy the Secretary thinks the court can impose other than offering the state the option of complying or losing the benefit of federal participation. That is precisely what the Secretary is authorized to do. It is clear, furthermore, that the Congress intended the imposition of sanctions, the form of sanctions and relief from sanctions to be committed to the discretion of the Secretary.

It is equally clear that compliance with 42 U.S.C. §1396a(a)(10)(C)(1976) is not mandated as a rule of law to be enforced by the courts, but is mandated only as a condition of federal participation in a Medicaid program.

The enforcement of this statute has not been committed to the courts to be executed through private right of action. Such judicial enforcement would interfere with the discretion expressly vested in the Secretary. I perceive her invitation to the court to intervene as a total distortion of the statutory scheme and as an attempt to avoid a thorny political decision, i.e., an abdication of responsibility.

There is much pressure on our courts to find a remedy for every wrong, to fill vacuums in political and executive leadership. The temptation to intervene is strong. To do so, however, is only to encourage further abdication.

If the Secretary had forthrightly said that she was staying her hand in the exercise of executive

discretion, and urged this court to back off, I would have no quarrel with her. I take issue with her attempt to get the court to do a disagreeable part of her job in disregard of the functional structure of the applicable statute.

In my opinion, the statute does not create a private right of enforcement or authorize the interference by the court in the executive discretion of the Secretary to administer sanctions created by §1396c. Accordingly, I decline to enter any injunction or restraining order based on the federal statute or regulations. The plaintiff's motion for a temporary restraining order is DENIED.

The constitutional issues have not been briefed or argued, however, and I shall retain jurisdiction of the case for the purpose of resolving the constitutional issues raised by the intervenor's complaint.

United States District Judge

CERTIFICATE OF SERVICE

RENE H. REIXACH, JR., counsel of record for respondents on whose behalf this brief is filed, hereby certifies:

I am a member of the Bar of this Court. On the 19th day of August, 1980, I served the annexed motion for leave to proceed in forma pauperis, affidavits in support thereof and brief in opposition to petition for writ of certiorari upon counsel for petitioner and all respondents not represented by the undersigned, as set forth on the annexed list, by depositing true copies thereof, first class postage prepaid, in sealed wrappers addressed to each at his or her respective address shown thereon, in an official depository maintained by the United States Postal Service. All persons required to be served have been served.

Dated: August 19, 1980

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